

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GEORGE L. WILLIAMS Claimant)	
VS.)	
)	
THE BOEING COMPANY)	Docket Nos. 186,109 & 223,159
Respondent)	
AND)	
)	
AETNA CASUALTY & SURETY COMPANY)	
KEMPER INSURANCE COMPANIES)	
Insurance Carriers)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Claimant requested Appeals Board review of the December 18, 1997, preliminary hearing Order, entered by Administrative Law Judge Jon L. Frobish.

ISSUES

Claimant, in his brief filed before the Appeals Board, raised the following issue:

- (1) Is claimant's current need for medical treatment the result of his preexisting bilateral knee condition or the result of the alleged July 22, 1996, work-related accident.

Claimant's Request for Review identified the issues for Appeals Board review as follows:

- (2) "Administrative Law Judge Frobish's failure to Order payment of permanent partial disability benefits to the Claimant at the appropriate rate under Docket No. 186,109;"

- (3) “Administrative Law Judge Frobish’s failure to Order payment of temporary total disability benefits to the Claimant at the appropriate rate under Docket No. 223,159.”

Respondent, in its brief, contends the Appeals Board does not have jurisdiction to review the preliminary hearing issues raised by the claimant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the briefs of the parties, the Appeals Board finds as follows:

Before discussing the merits of claimant’s appeal, the Appeals Board will address the issue raised by the respondent of whether the Appeals Board has jurisdiction to review the preliminary issues raised by the claimant. But first, it is necessary to explain the procedural history of how these two separately docketed claims became involved in the same preliminary hearing.

First, the claimant filed an Application for Hearing on May 19, 1997, alleging an injury to both knees on July 22, 1996, and/or each working day thereafter. Claimant followed that application with an Application for Preliminary Hearing that was filed on May 30, 1997. A preliminary hearing was held before the Administrative Law Judge on June 26, 1997.

At that preliminary hearing, claimant requested the appointment of Dr. Bradley W. Bruner, an orthopedic surgeon, as the authorized treating physician for claimant’s bilateral knee injuries. The respondent notified the Administrative Law Judge that claimant had previously injured both of his knees while working for the respondent. In fact, the claimant was currently receiving weekly permanent partial general disability payments in the amount of \$70.60 per week as a result of a November 13, 1995, settlement. The settlement was for an April 9, 1993, date of accident and was based on Dr. Bruner’s permanent functional whole body impairment rating of 16 percent for injuries to both of claimant’s knees. It included the agreement that future medical treatment would be provided upon proper application and approval of the Director of Workers Compensation.

After claimant testified, the Administrative Law Judge continued the hearing in order to review the November 13, 1995, settlement award assigned Docket No.186,109. The Administrative Law Judge also requested that the insurance company that provided coverage in that docketed claim be given notice of these proceedings.

Second, the continued June 26, 1997, preliminary hearing was held on August 12, 1997. On July 7, 1997, after the first preliminary hearing, claimant filed a Petition for Review and Modification in the earlier case, and requested, among other requests, authorization of Bradley Bruner, M.D., as treating physician and temporary total disability payments if claimant was taken off work.

During this preliminary hearing, claimant's attorney notified the Administrative Law Judge that he had filed a Petition for Review and Modification in Docket No. 186,109, and although he had made other requests in the petition, his request at the preliminary hearing remained only for the appointment of Dr. Bruner as claimant's authorized physician under either Docket No. 186,109 or Docket No. 223,159. No additional testimony was presented and no additional medical evidence was offered or admitted.

The Administrative Law Judge in an Order dated August 12, 1997, authorized Dr. Bruner as claimant's treating physician. The Order was made in Docket No. 186,109 and Aetna Casualty & Surety Company, the insurance carrier that had coverage in Docket No. 186,109, was ordered to pay for claimant's medical treatment. The claimant did not appeal the August 12, 1997, Order to the Appeals Board.

The Appeals Board finds the August 12, 1997, Order was the result of a preliminary hearing and was not a final order as a result of a hearing held on claimant's Petition for Review and Modification. This finding is supported by the fact that the August 12, 1997, hearing was a continuation of the June 26, 1997, preliminary hearing. The testimony and medical records submitted at the June 26, 1997, preliminary hearing were stipulated into the record of evidence only for the purpose of that August 12, 1997, preliminary hearing. The only new evidence presented at this continued preliminary hearing was the Workers Compensation Division file in Docket No. 186,109.

Third, the claimant filed another Application for Preliminary Hearing on October 29, 1997. That application included both Docket Nos. 186,109 and 223,159. The application resulted in the December 18, 1997, preliminary hearing and subsequent December 18, 1997, preliminary hearing Order. The claimant requested the Administrative Law Judge to modify the August 12, 1997, Order. Claimant argued he was entitled to medical treatment and temporary total disability benefits in Docket No. 223,159 with the date of accident July 22, 1996, instead of Docket No. 186,109 with the date of accident April 9, 1993. By the time of this preliminary hearing, claimant had undergone left knee surgery and had been off work. Respondent's and claimant's attorneys' remarks at the December 18, 1997, preliminary hearing indicate that claimant had returned to work on or about December 8, 1997.

The parties stipulated that the June 26, 1997, preliminary hearing testimony and the medical evidence admitted therein were to be made a part of the December 18, 1997, preliminary hearing record. In addition, claimant offered and the Administrative Law Judge admitted into evidence an additional medical report from Dr. Bruner dated December 4, 1997. The respondent also offered and the Administrative Law Judge admitted into evidence a letter from respondent's attorney to claimant's attorney dated November 24, 1997. The Administrative Law Judge in the December 18, 1997, preliminary hearing Order found claimant had not suffered a new injury or aggravated a preexisting injury. The Administrative Law Judge found the August 12, 1997, Order should remain in place and the respondent was paying compensation in the appropriate manner.

The respondent contends the issues raised by the claimant are not jurisdictional issues listed in K.S.A. 1997 Supp. 44-534a, and therefore, the Appeals Board does not have jurisdiction to review the December 18, 1997, preliminary hearing Order. In the alternative, the respondent argues the claimant was required to appeal the August 12, 1997, preliminary hearing Order, if the claimant wanted to challenge the finding of the Administrative Law Judge, that claimant's current need for medical treatment was the result of his previous injuries and not a subsequent aggravation of those injuries.

The Appeals Board agrees the two issues raised by the claimant in his Request for Review before the Appeals Board and designated as issues number two and three above are issues the Appeals Board does not have jurisdiction to review at this juncture of the proceedings. However, as pointed out above, the claimant also raised the issue before the Administrative Law Judge of whether his current need for medical treatment is a result of his preexisting knee injuries or the result of an aggravation of those injuries from his current work activities.

The Appeals Board finds the December 18, 1997, Order entered by the Administrative Law Judge is a preliminary hearing order entered pursuant to the preliminary hearing statute. The Appeals Board also finds the issue raised by the claimant, whether claimant's need for current medical treatment is a result of the preexisting bilateral knee injuries or an aggravation of those preexisting injuries, is a jurisdictional issue that grants Appeals Board review of a preliminary hearing order. See K.S.A. 1997 Supp. 44-534a(a)(2).

The Appeals Board rejects the respondent's alternative argument that the preliminary hearing order is not reviewable by the Appeals Board because the issue raised by the claimant was previously litigated and decided by the Administrative Law Judge's Order dated August 12, 1997. The Appeals Board finds since the August 12, 1997, Order was a preliminary hearing order and not a final order, the Administrative Law Judge had the authority to hold another preliminary hearing on the issue of whether claimant's need for medical treatment was related to the April 9, 1993, or the July 22, 1996, accident. The Appeals Board has, on other occasions, had the opportunity to decide this issue and has found there is no limitation on the number of preliminary hearings an Administrative Law Judge may hold in a case. The Administrative Law Judge has the jurisdictional authority to amend, modify, and clarify a preliminary hearing order as the evidence may dictate or as circumstances may require. See Sevilla v. Ismael Calderon, Docket No. 211,139 (April 1997).

The parties stipulated that the December 18, 1997, preliminary hearing record would consist of claimant's exhibit No. 1 and respondent's exhibit No. 1 offered and admitted by the Administrative Law Judge. In addition, the parties stipulated the June 26, 1997, preliminary hearing transcript and the Division of Workers Compensation administrative file in Docket No. 186,109 would be included in the record.

Claimant's exhibit No. 1 was an additional medical report dated December 4, 1997, from claimant's treating physician, Dr. Bruner. The Administrative Law Judge found

Dr. Bruner's medical report was not persuasive and therefore left the August 12, 1997, preliminary hearing Order in place.

The Appeals Board concludes the greater weight of the evidence contained in the preliminary hearing record as a whole proves that claimant's current bilateral knee problems are the direct result of an aggravation caused by a specific incident at work on July 22, 1996, and each working day thereafter. The Appeals Board finds claimant's testimony along with the medical records of claimant's treating physician, Dr. Bruner, support this conclusion. Claimant testified he twisted his left knee at work on July 22, 1996, while loading a crown skin onto a tool. The knee became swollen and symptomatic. He notified the respondent of the injury, and respondent provided medical treatment. Claimant was first treated at St. Joseph Hospital in Wichita, Kansas. He was fitted with a brace and eventually was referred to his prior treating physician, Dr. Bruner.

Dr. Bruner saw claimant for his current knee injury on August 12, 1996. Dr. Bruner placed claimant in a regiment of physical therapy. Claimant did not make significant improvement, and on April 7, 1997, Dr. Bruner recommended arthroscopic surgery for the left knee. At that time, respondent notified Dr. Bruner he was not authorized for further treatment of claimant's left knee.

Dr. Bruner had previously treated claimant for bilateral knee injuries from 1993 through 1995. Dr. Bruner released claimant with permanent restrictions and a 16 percent permanent functional impairment rating on June 5, 1995. Claimant thereafter settled his workers compensation case with the respondent on November 13, 1995, for the 16 percent whole body functional rating.

In Dr. Bruner's medical reports dated May 27, 1997, June 9, 1997, and December 4, 1997, admitted into evidence during the preliminary hearings held in this matter, Dr. Bruner concluded that claimant's current need for medical treatment was a result of claimant's July 22, 1996, injury that had aggravated his preexisting bilateral knee condition. Dr. Bruner opined the current injury caused a 2 percent additional physical impairment to both of claimant's knees. Furthermore, the aggravation caused 40 percent of claimant's current problems, and the preexisting condition caused 60 percent of claimant's current knee problems.

The Appeals Board is mindful the respondent had claimant examined and evaluated by Bernard T. Poole, M.D., on May 19, 1997. Dr. Poole's report dated May 23, 1997, was admitted into evidence during the June 26, 1997, preliminary hearing. Dr. Poole concluded the July 22, 1996, episode at work was purely incidental in the course of claimant's degenerative disease process, and he could not state that the pathology now present in claimant's knees were attributable to a new injury. However, the doctor went on to opine that this type of knee arthritis could have increased symptoms from a twisting and straining injury.

In a workers compensation case, a worker suffers a separate work related injury where the worker's work activities either aggravate or accelerate a preexisting injury. See Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, Syl ¶ 1, 573 P.2d 1036 (1978).

The Appeals Board concludes the Administrative Law Judge preliminary hearing Order dated December 18, 1997, should be reversed. Claimant's need for medical treatment for his bilateral knee injuries is the result of his work activities that occurred on July 22, 1996, and each and every working day thereafter now claimed under Docket No. 223,159. The Appeals Board finds the parties stipulated that the temporary total disability weekly rate for an accident date following July 22, 1996, would be \$338 per week. The respondent also has not objected to Dr. Bruner as the authorized treating physician.

Therefore, the Appeals Board finds it is not necessary to remand this case to the Administrative Law Judge and orders the respondent to provide medical treatment for claimant's bilateral knee injuries through Dr. Bradley Bruner as the authorized treating physician. If claimant was taken off work by Dr. Bruner, he should be paid temporary total disability benefits at the rate of \$338 per week retroactive to October 29, 1997, the date claimant filed this application for preliminary hearing. Also, if claimant is taken off work by Dr. Bruner in the future, temporary total disability benefits should be paid at the rate of \$338 per week.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order of Administrative Law Judge Jon L. Frobish, dated December 18, 1997, should be reversed, and respondent is ordered to provide medical treatment for claimant's bilateral knee injuries through Dr. Bradley Bruner as the authorized treating physician. Temporary total disability benefits are to be paid at the rate of \$338 per week from October 29, 1997, if Dr Bruner took claimant off work, and temporary total disability benefits are also to be paid if Dr. Bruner takes claimant off work in the future.

IT IS SO ORDERED.

Dated this ____ day of March 1998.

BOARD MEMBER

c: Roger A. Riedmiller, Wichita, KS
Vaughn Burkholder, Wichita, KS
Edward D. Heath, Jr., Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director